

WHITE COLLAR CRIME WITHIN PROPERTY AGENTS TRUST ACCOUNTS

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ABSTRACT

Property Agents in New South Wales, have a duty of care towards the correct accountability of trust money held on behalf of their principle, for example the landlord and vendor. Society over the years though, has changed; and with the increase in white collar crime consumer confidence has eroded and government regulation has increased to enhance consumer protection. The question therefore arises whether or not white collar crime can be prevented. However, without understanding the reasons for the crime occurring, it is difficult to implement safety mechanisms to prevent the fraud. This research paper examines a number of constant characteristics associated with white collar crime and concludes that the four characteristics *Motive, Targets, Access* and *Opportunity*, form the basis for white collar crime in a property agency.

INTRODUCTION

During the last 100 years, regulatory policy has been developed to exemplify the standards for social responsibility and ethical behaviour between property agents and their principal. The licensing of property agents in Australia is regulated under the auspices of individual state and territory Offices of Fair Trading.

Generally, those who work in the property industry buying, selling, leasing and negotiating in property transactions must be either licensed or hold a certificate of registration. In NSW a licensed property agent, under the Property Stock and Business Agents Act 2002 (Property Act), is a person who for reward is able to “negotiate or induce a range of property transactions including a sale, purchase, exchange and leasing” and to “receive money associated with these transactions” (Office of Fair Trading, NSW, May 2008). The receipt of this money requires the licensed entity to hold this money in a separate Trust Account for the exclusive benefit of their client.

Examples of trust money include deposits on sales, rent from tenants, bonds and prepaid advertising. Transactions relating to deposits on sales usually involve large amounts of money, with property agents normally holding a percentage of this amount in their trust accounts. However, consumers engage in property transactions relatively infrequently and therefore have limited knowledge of the property sector industry. Consequentially, licensing regulation is regarded as an important way of protecting consumers (Office of Fair Trading July 2008). So the safe keeping of these monies held in trust, and the level of competence by the people who supervise this money requires an ethical code of conduct to preserve and enhance consumer protection.

A risk management objective of the legislation is the need for the correct handling of trust money, in addition to other issues such as the agents’ duty of care and disclosure with advertising, price quoting, condition of the property etc. In recent years, annual inspections undertaken by Fair Trading, additional compliance initiatives, investigation of administrative aspects of the property agency, and continuing mandated auditing of the trust records has resulted in successful prosecutions. These penalty notices and prosecutions are undertaken by Fair Trading for offences under the Property Act. For instance during the financial year ended 30th June 2014, there were 108 penalty notices issued, with fines totalling \$118,800; 7 licenses suspended, and 61 licences disqualified and cancelled. In the same financial year, there were 23 successful prosecutions with fines totalling \$1,322,398.60. The

offences in these categories include trust account misappropriation, unlicensed entities, collusive practice at auctions, misrepresentation and underquoting (Fair Trading (c) 2014).

Additionally, in order to strengthen consumer protection, under the Property Act, the Property Services Compensation Fund in NSW was established to provide financial compensation to people whose money had been misappropriated by a licensed property agent. The majority of the funding for the compensation fund is through licensing revenue received by the NSW Office of Fair Trading through the issuing of property agency certificates of registration and also license renewals.

This research paper examines a number of constant characteristics associated with white collar crime and trust accounting fraud. The first part of the paper discusses the literature for white collar crime, and the duty of care in accurately maintaining a trust account on behalf of the principal. This leads into a discussion identifying the circumstances and events which provided the offender with the opportunity to carry out the fraud. Various court cases are included within the analysis, highlighting the fraudulent activities. The paper concludes with a summation of the white collar crime characteristics in a property agency.

LITERATURE REVIEW

Agency theory relationship is based on trust, and involves the consumer engaging a person to act on their behalf. For instance, one party is designated as the agent, and will act for and on behalf of the consumer, called the principal. The principal can represent the landlord and/or vendor, and whilst the prospective tenant or purchaser negotiate with the agent, the signed agency agreement is with the principal. In New South Wales, there are various categories of property agency licences. A licenced real estate agent is able to act on behalf of a vendor or landlord; a licenced buyer's agent will act on behalf of the purchaser. However, from the perspective of the Property Services Compensation Fund, the consumer can be the principal, tenant, or purchaser. The regulatory impact for property agents is to ensure correct accountability in the handling of trust money – which has been identified as “one of the greatest areas of risk property owners face in transactions with real estate agents”. (Fair Trading July 2008).

Sutherland (1939) considered crime and social status. He attempted to prove a correlation between money and social status, and to identify the differences between white collar crime and blue collar crime. For instance, he classified blue-collar crimes as arson, burglary, theft, assault, rape and vandalism, whilst white collar criminals were considered to be “opportunists” who took advantage of their circumstances, and were placed in a position of trust. Taft (1951) identified blue-collar crimes as the crimes of the under-privileged, whilst white collar crimes brought “material rewards with little or no loss of status”, although both types of crime are usually a criminal prosecution by the courts.

Clinard (1952) defined white-collar crime as "a violation of the law committed primarily by groups such as businessmen, professional men, and politicians in connection with their occupations". Similarly, Hartung (1950) proposed white collar crime as “a violation of law regarding business which is committed for a firm by a firm or its agents in the conduct of its business”. Both Clinard and Hartung associated the connection of crime with the offenders' occupation and regular business dealings. Therefore, is the misappropriation of trust money considered white collar crime? The answer is yes, according to these definitions, because trust money evolves from the furtherance of running a property agency business, the agent is required by law to be the holder of an occupational license, and the fraud is the stealing of the trust funds. Therefore, to further define the “white-collar crime” concept it is important to recognise that the crime which has been committed is “job-specific”.

Society over the years has changed, and with the increase in white collar crime, consumer confidence has eroded and government regulation has increased to enhance consumer protection. The question therefore arises whether or not white collar crime can be prevented. However, without understanding the reasons for the crime occurring, it is difficult to implement safety mechanisms to prevent the fraud. In this regard, research undertaken by Boyd (1995) identified the following characteristics

which underpin the contributing circumstances for white collar crime: *Motive + Targets + Access + Opportunity* and concluded that most people who commit the crime hold positions of trust within those organisations. Likewise, Gu, Liang and Wang (2005) developed a theoretical framework for detecting accounting fraud, using the three elements theory concept and identified *Interest, Environment and Implementation* as those three necessary elements.

These two separate works reveal similar characteristics. *Motive* and *Interest* can be combined where an agent commits fraud due to cash flow problems within their agency; *Target* in a Property Agency would equate to the trust funds; *Access* and *Environment* relates to the immediate availability of the trust funds; and *Opportunity* and *Implementation* are the instances where the offender is in a position of trust and able to access the trust funds and the fraud might be undetected initially. These fraudulent instances can also include incorrect computer transactions relating to the trust accounts. Therefore, white collar crime includes a property agency practice where the trust funds have been misappropriated. In the next section, the research methodology is modelled on the identified characteristics in this literature review.

RESEARCH OBJECTIVE, METHODOLOGY and LIMITATIONS

With regards to the property sector in New South Wales, mandated licensing requirements for agents have existed for over 100 years. However, with the documented increases in trust accounting fraud, and the subsequent criminal convictions, discussions raised with government and consumer groups, include possible mechanisms which can be implemented to minimise the fraud i.e. the misappropriation of trust funds.

Therefore, the research objective is to identify the circumstances and events which led the offender to carry out the fraud; and as mentioned earlier in the literature the following equation has been identified to contain the elements of these contributing circumstances for white collar crime:

$$\text{Motive} + \text{Targets} + \text{Access} + \text{Opportunity}$$

In this instance, the research also includes the following research question:

1. *Was the fraud committed by an owner of the business or by an employee of the business?*

IMPACT: Determines the level of supervision by the licensee in charge and the level of “internal control procedure” in the office to minimise risk in crime and fraud.

The research method involved a selection of eight court cases, where the defendants were prosecuted for misappropriation of trust funds, under the Property Act. In some instances the outcome of the court hearing, also included a prison term. The court cases were analysed with the purpose of obtaining the following information:

Prosecution year, location of office, date offences occurred, licence/certificate including the years, reason for the fraud, amount misappropriated and court sentence outcome.

The purpose of these nominated classifications was to explore the possibility of a common link between the court cases, to identify any emerging trends for fraudulent behaviour in the property agency office and to provide an opportunity to test the research undertaken by Boyd (1995). The sample of eight court cases undertaken in this research is a subset of a larger analysis scanning 20 years of court cases.

With the nominated classifications for the current research in this paper, the correlation with the white collar crime equation is as follows:

MOTIVE	Reason for the misappropriation of trust funds
TARGETS	Specific aim to utilize the trust funds which are not required for immediate disbursement on behalf of the agency's clients
ACCESS	Availability of trust funds
OPPORTUNITY	Is the offender in a position of trust and able to access trust funds

Whilst the research methodology has narrowed the parameters to these identifiable clusters, this is not intended to dismiss other contributing factors associated with white collar crime. For example, it is worthy to mention the economic upturn and downturn in the real estate industry, and the geographical location of the agency office, as possible additions to the corruption equation. Furthermore, the eight court cases sampled were from the state of New South Wales; this limitation in the research was necessary due to the fact that each jurisdiction within Australia has varying legislative requirements relevant to trust accounting. The next section of the paper discusses the results from the selected court cases.

DISCUSSION AND ANALYSIS

Whilst the documentation from Fair Trading, recording the various court cases, is publicly available, for privacy reasons the names and licence/certificate number details of the offenders are not listed below in the table. Therefore, the number along-side each entity is for the purpose of identification and mapping the court cases used within the research analysis conducted. Below in Table 1 is a summary of the analysis from the eight court cases.

TABLE 1: Successful Prosecutions for Trust Account Money Misappropriated

ITEM	IS ENTITY ASSOCIATED WITH OFFENDER	PROSECUTION YEAR	OFFICE LOCATION	DATE OFFENCES OCCURRED	REASON	TRUST AMOUNT MISAPPRRIATED
1	YES	2012	Earlwood	2011/2012	-	\$ 18,017.00
2	YES	2013/2014	Wollongong	2012 and prior	Business was running at a significant loss	\$1,235,402.67 \$198,708.76
3	YES	2013	Surry Hills	2012	Gambling addiction	
4	YES	2013	Enfield	2009	-	\$15,000.00
5	YES	2014		2013 and prior	-	Over \$1,000,000.00
6	YES	2013/2014	Pymble	2011	Funds used to pay for illegal drugs for spouse to alleviate her pain from failed surgery.	\$350,000.00
7	YES	2014	Hawkesbury	2011 and prior	-	\$208,639.51 \$55,062.14 \$66,650.00
8	YES	2014	Bathurst		Funds taken for personal use	\$225,323.16

Source: Collated and analysed from the NSW Fair Trading Annual Reports 2012-2014 (c) and Enforcement Schedules 2012-2014 (a & b).

As mentioned in the research question, the research methodology sought to question the relationship between the entity and the offender. Above in Table one, in the second column, it is noted that with each court case, the offender was associated with the entity prosecuted. In other words, the entity might have been a company structure with the offenders holding the position or title of director and/or secretary. In this type of scenario the company, offending director and/or secretary are prosecuted; in other cases the offender might have been a sole trader. The importance of this column is discussed further, in the next paragraph.

In the research undertaken by Boyd (1995) the suggested characteristics for fraud was represented by the model *Motive + Targets + Access + Opportunity*. With the first consideration being *Motive*, the reasons for carrying out the fraud in the majority of the court cases, related to a personal requirement; it is noted that in some cases the reasons for accessing the trust funds were not disclosed. However, regardless of the personal need or excuse for using the money, which is held in trust on behalf of their client, how can this action be justified as any other purpose but fraud?

The second characteristic relates to *Targets*; where in this instance it is clearly represented by the trust fund money. These court cases analysed, relate to funds held both in the Sales Trust Account, and the Property Management Trust Account; additionally, non-lodgement of bond money was also a point of target. The next characteristic is *Access*; since each offender in the nominated court cases is associated with the entity, the offender would be aware of the availability of the trust funds and the amount of money held in trust. The last characteristic being *Opportunity* can be argued is the most important, in terms of preventing fraud, followed by *Access*. For instance the owners of the business are in a position of trust, and as signatories of the trust account, there are no barriers to prevent the trust money misappropriation.

There is also usually an anomaly between the amount of money listed for prosecution, and the amount of money consumer's claim from the compensation fund. One reason for the difference is the fact that consumers have up to two years from when they become aware of the fraudulent act, to lodge a claim against the Property Services Compensation Fund. In some instances the compiling of evidence is not readily available or may have been destroyed or withheld, and it is through the consumer claims, that the evidence is compiled. This delay also explains the time lag from the dates when the fraud occurred to the dates when the prosecution was finalised through the court system. Additionally, issues such as licence cancellation and disqualification might occur separately from other court proceedings. In conclusion, depending on the complexity of the misappropriation of trust money, and the ability to compile the evidence appropriately, will determine the procedure and process for the prosecutors.

CONCLUSION

The research paper has examined eight court cases from the years 2012 to 2014, where the prosecutions related to the misappropriation of trust fund money, ranging from \$15,000 to \$1,434,111.43. The characteristics for fraud, as suggested by Boyd (1995) were tested against these court cases. The results identified a clear trend, where in all of these court cases, the offences of fraud were carried out by either the owner/s of the business, or the offenders had an association with the business. Furthermore, because of this *opportunity*, the offenders were able to remove substantial amounts of money, mainly undetected until consumers lodged complaints at Fair Trading. In fact misappropriated money for two of the eight court cases were amounts of over \$1 million for each court case. The remaining characteristics were also identified as existing in the eight court cases, thus providing a platform for further research.

In conclusion, the four characteristics *Motive, Targets, Access* and *Opportunity*, form the basis for white collar crime in a property agency. The ready availability of trust money appears to be a temptation for many individuals. Whilst this action of fraud is associated with a prison sentence and the loss of a licence, the punishment does not seem to be deterring this unethical behaviour.

REFERENCES

Boyd, J.M. & Edwards, S.D (1995), Introduction To Fraud, Corruption and Ethics Working Paper No. 57. Corruption Prevention Division, Criminal Justice Commission Brisbane

Clinard, MB 1952, *The black market: A study of white collar crime*. National Criminal Justice Reference Service.

Fair Trading NSW (a) accessed 12th February 2015

http://www.fairtrading.nsw.gov.au/ftw/About_us/Data_and_statistics/Compliance_and_enforcement_data/Disciplinary_results.page#Property_services

Fair Trading NSW (b) accessed 12th February 2015.

http://www.fairtrading.nsw.gov.au/ftw/About_us/Data_and_statistics/Compliance_and_enforcement_data/Summary_of_compliance_and_enforcement_results.page

Fair Trading NSW (c) accessed 2/12/2014

http://www.fairtrading.nsw.gov.au/ftw/About_us/Publications/Annual_reports.page

Gu, L & Liang J & Wang J 2005, Theoretical Framework and Method of Detecting Accounting Fraud, *Journal of Modern Accounting and Auditing*, Vol. 1. No. 7 pp 67-71.

Hartung, FE 1950, White collar offenses in the wholesale meat industry in Detroit, *Journal of Sociology*, Vol 56, No. 1.

Office of Fair Trading, (May 2008), *Statutory Review of Property, Stock and Business Agents Act 2002*, NSW Office of Fair Trading, Sydney.

Office of Fair Trading, (July 2008), *The Report – Statutory review of the Property, Stock and Business Agents Act 2002, Chapter 12*, NSW Office of Fair Trading, Sydney.

Property Stock and Business Agents Act 2003 and the Associated Regulations, New South Wales (State).

Sutherland, EH 1939, American Sociological Society: Presidential Address. Speech cited by J Braithwaite (1985), *Annual Review of Sociology*, Vol 11, 1985.

Taft, D.R., (1951), Implication of the Glueck methodology for criminological research. *Criminology and Police Science*.